No. 11,545

IN THE

United States Court of Appeals

For the Ninth Circuit

Z. E. EAGLESTON,	
	Appellant,
vs.	
UNITED STATES OF AMERICA,	
	Appellee.

CLOSING BRIEF IN SUPPORT OF SUPPLEMENT TO STATEMENT OF POINTS ON WHICH APPELLANT RELIES ON APPEAL.

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INTRODUCTION.

All throughout appellee's reply to appellant's brief in support of his supplemental points on appeal, appellee directs the Court's attention to the fact that appellant objected to only one of the instructions now specified as error. This fact does not preclude this Court from noticing and correcting those plain errors which affect the substantial rights of appellant even though they were not challenged in the trial Court.

Federal Rules of Criminal Procedure, Rule 52(b);

Morris v. United States, 156 F. (2d) 525.

ARGUMENT.

Point 21.

While appellee's quotation from Corpus Juris Secundum (Brief in Reply to Appellant's Brief in Support of Supplemental Statement of Points, p. 3) supports his contention that in *some* jurisdictions it is proper for the Court to instruct the jury that the presumption of innocence is not intended to aid those actually guilty but to prevent an innocent person from being convicted, this clearly is not the Federal rule. This Court in *Gomila v. United States,* 146 F. (2d) 372, referring to such instruction clearly stated that it *"is not a correct statement of the law"*.

The Court further held that such instruction constitutes patent reversible error which the Court must notice and correct even though not challenged during the trial.

Points 22 and 23.

To clarify the ambiguous language of the Alaska Statute defining simple assault is not to legislate. If the language of a statute is not sufficiently clear, the Court should explain it.

Morris v. United States, 156 F. (2d) 525, 529.

Point 24.

Appellee apparently considers that the instruction complained of in this point is erroneous, but claims that such error was elsewhere cured in the instructions. This we do not concede, because of the ambiguous nature of the instructions given on assault and because the cumulation of such errors cannot be treated as harmless.

Point 25.

There was substantial circumstantial evidence in the case. The whole theory of the case, whether the victim was struck on the head by a rake or received his wound after falling and striking his head on a shovel was, in great measure, dependent upon circumstantial evidence.

The trial Court having observed "Part of the evidence in this case is of the kind called 'circumstantial' " (T. R. 12) was thereafter obligated to give a correct instruction on circumstantial evidence. This it failed to do over objection of appellant's counsel. (T. R. 23.)

The prejudicial and reversible nature of this error is set forth in our opening brief on these supplemental points on appeal at pages 11 and 12.

Appellee's observation in his reply, page 9, that this erroneous instruction might well have been omitted has no application to the present case. This is not a case where the Court refused a requested instruction, but one in which the Court *actually* instructed and instructed erroneously. In *United States v. Arrow Packing Corp.*, 153 F. (2d) 669, 671, cited by appellee, the Court gave a correct instruction on circumstantial evidence and one which clearly supports appellant's contention that such evidence must exclude every reasonable hypothesis but that of guilt. The Court there approved an instruction that "The circumstantial evidence must be such as to exclude every reasonable hypothesis except the fact sought to be proved".

The case of *McCoy v. United States,* 169 F. (2d) 776, also cited by appellee is a case wherein the trial Court refused a requested instruction on circumstantial evidence. While the Court in that case ruled that such instruction was not essential under the circumstances it did *not* rule that a Court undertaking to instruct on circumstantial evidence can thereafter avoid the consequence of a clearly erroneous instruction. In that case the trial Court told the jury:

> "When two conclusions may be reasonably drawn from the evidence, the one of guilt and the other of innocence, the jury should reject the one of guilty and accept the one of innocence, and in that event should find the defendant not guilty. That is where two conclusions can be drawn as reasonably one way as the other, one pointing to the guilt and one to the innocence, you, of course, must indulge the presumption of innocence and draw the conclusion of innocence."

No such instruction was given by the trial Court in the instant case. No reference whatsoever was made to the principle that the accused shall be acquitted where the evidence may be reconciled with the hypothesis of innocence equally with that of guilt.

The trial Court in the instant case in saying that the circumstantial evidence must "be *more* consistent with guilt than with innocence" in effect was making the quantum of proof required a mere preponderance of evidence.

Point 30.

The charge to the jury when read as an integrated whole is unfair to appellant.

It failed to instruct on self-defense.

It removed from the consideration of the jury the issue of self-defense.

It wrongfully assumed that appellant had committed an assault on the victim.

It misled the jury by disclosing the lesser punishment for a violation of the included offense without indicating the punishment for the greater offense.

It gave ambiguous instructions on assault with a dangerous weapon and simple assault.

It erroneously instructed on the presumption of innocence.

It erroneously instructed on circumstantial evidence.

It minimized the rule requiring proof beyond a reasonable doubt.

The prejudice resulting to the appellant from the aforementioned erroneous instructions becomes even more manifest when viewed in the light of conditions existent during the course of the trial and, in particular, the use of the photographs, Exhibits 7, 9 and 10, which served no other purpose than to incite prejudice, horror, passion and indignation in the minds of the jury.

CONCLUSION.

For the reasons above stated and heretofore set forth in the prior briefs filed by appellant, the multiple errors committed by the Court below resulted in such substantial prejudice to appellant as to deny him a fair trial.

Dated, San Francisco, California,
November 15, 1948.

Respectfully submitted,

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